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SUPREME COURT, U.S.

NO. 81-2285

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF CONNECTICUT,
Petitioner,

v.

RICHARD OSTROSKI,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

JERROLD H. BARNETT
JON C. BLUE
JOETTE KATZ
Chief Public Defender's Office
121 Elm Street
New Haven, Connecticut 06510
(203) 789-7477
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether Respondent was seized in violation of the Fourth Amendment when he was brought to and interrogated at the state police barracks on April 16, 1977?

2. If Respondent was seized prior to his formal arrest following his confession on April 16, 1977, may this Court consider whether that seizure occurred at a point in time at which the police had probable cause to believe he had committed murder where Petitioner expressly conceded in the courts below that it did not have such probable cause until Respondent had actually confessed?

3. Whether the admission of Respondent's confession and certain physical evidence obtained as a result of that confession was harmless beyond a reasonable doubt where there has been no showing that Petitioner's illegal action did not induce Respondent's trial court testimony?

4. Whether a good-faith exception to the exclusionary rule should be adopted and applied in this case where this claim was not raised, preserved, and passed upon in the courts below and a lack of good faith is apparent from the record?

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STATEMENT CONCERNING JURISDICTION

For the reasons discussed at length infra, this Court lacks jurisdiction under 28 U.S.C. §1257(3) to consider questions (2) and (4) presented by the Petition since those questions were never raised, preserved, or passed upon in the courts below. There are, moreover, no special and important reasons for reviewing any of the questions presented. See S.Ct. Rule 17.1.

STATEMENT OF THE CASE

I. PRELIMINARY DISCUSSION

On October 19, 1978, Respondent was convicted of the crime of murder in violation of Conn. Gen. Stat. §53a-54a by a three judge court.[1] On November 27, 1978, he was sentenced to a term of imprisonment of not less than twenty-five years nor more than life.

Ultimately, after two appeals, Respondent's conviction was set aside, and a new trial was ordered. The reversal was predicated upon the determination by the Supreme Court of Connecticut that Respondent had been seized and held in custody without probable cause. The Court held that the admission at Respondent's trial of his confession and the physical evidence obtained as a result of his custodial interrogation violated the Fourth Amendment's protection against unreasonable seizures.

II. EVIDENCE, ARGUMENTS, FINDINGS, AND RULINGS AT THE TRIAL

During the night of April 11-12, 1977, Kim Steacy was stabbed to death in her apartment on Main Street in the Village of Collinsville, located in the Town of Canton, Connecticut. The homicide was discovered by Donald Miller, with whom Ms. Steacy was living, when he returned to the apartment in the early morning on April 12.

The Canton Police Department requested assistance from the Connecticut Stated Police in investigating the crime. Captain McDonnell, commander of the State Police Detective Division assumed charge of the investigation.

Among the items found at the scene were a bloody palm print on the kitchen counter and a trail of blood, determined to be of type AB, leading from the apartment to an adjacent parking lot.

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[1] Conn. Gen. Stat. §54-82(b) permits a defendant who is accused of a crime punishable by death or imprisonment for life to waive his constitutional right to a trial by jury and to elect a trial by a court composed of three judges.

In the course of the investigation, the police interviewed Mr. and Mrs. Quigley who had visited with the victim on April 8, 1977, the Friday preceding the homicide. While they were present, a man had come to the doorway and invited them to a party in the apartment across the hall. The Quigleys were shown a photograph of Respondent, who was known to be friendly with the occupant of the adjacent apartment, and they identified him as the man who had extended the invitation.

Following their meeting with the Quigleys, the police went to Respondent's apartment on Market Street in Collinsville. No one was at home, and neighbors had complained of the barking of Respondent's dog.

Captain McDonnell issued an order that Respondent was to be found. Trooper Blais questioned Respondent's parents and in-laws and left messages with them for Respondent to call Captain McDonnell at the Litchfield State Police Barracks. Personnel at the barracks were informed that Captain McDonnell wanted to talk with Respondent. From speaking with Respondent's mother-in-law, Trooper Blais ascertained that Respondent and his wife and child had visited his brother-in-law in Plattsburg, New York. On receipt of this information, Captain McDonnell assigned Trooper Blais to a toll booth on the Massachusetts Turnpike in order to watch for Respondent.

On Saturday, April 15, 1977, at 6:05 p.m., Respondent called the Litchfield Barracks from a telephone booth in New Milford, Connecticut, a town close to the New York line and approximately twenty miles from Litchfield. He had just reentered Connecticut and had been informed in a telephone conversation with his mother that Captain McDonnell wished to speak with him.

The call was taken by Trooper McDermott. When Respondent stated he was unfamiliar with the route to the barracks, McDermott

started to give directions which he described as complicated. But, when Respondent suggested that he arrive the next day, McDermott's reply was that he was to come to the barracks that night. McDermott stated he would send a trooper to meet Respondent and lead him to the barracks. According to McDermott, Respondent agreed to this procedure.

Sergeant Cibula was the supervisor at the Litchfield Barracks on the evening of April 16, 1977. Although Cibula was aware that a homicide had occurred in Collinsville, he did not know any specific details. Sergeant Cibula testified that when he was notified of Respondent's call, he was determined that Respondent was going to the New Milford Police Department.[2] Consequently, at Sergeant Cibula's direction, Trooper McDermott arranged for Officer McKay of the New Milford Police to go to the site of the telephone booth and escort Respondent to the New Milford Police Station. When Officer McKay, who had been subpoenaed, was unable to testify at Respondent's trial because of reported dental problems, Petitioner's attorney conceded that Respondent had been "in the custody of an Officer McKay from New Milford" when he was escorted to the New Milford Police Station.[3] Petitioner's attorney referred to McKay as the "transporting authority."[4]

Respondent and his wife and child were then taken from the New Milford Police Station to the Litchfield Barracks in a police car driven by Sergeant Cibula. Respondent's car was left in New Milford.[5] Cibula testified that he did not ask any questions during the forty minute drive, but that Respondent volunteered statements that Captain McDonnell wanted to talk to him about a homicide in Canton,[6] that he suspected the police wished to speak

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[2] T. 379.

[3] T. 348.

[4] T. 390.

[5] T. 489.

[6] Respondent received this information in the telephone conversation with his mother on arriving in Connecticut before he called the Litchfield Barracks. T. 479, 486-87.

with him about his dog, and that recent carpentry work had caused the cuts on his hands.

They arrived at the barracks at 8:10 p.m. Sergeant Cibula introduced Respondent to Captain McDonnell, who was accompanied by Sergeant Cudowrth of the Canton Police Department. McDonnell, Cudworth, and Respondent went upstairs to a room on the second floor. Respondent's wife and child remained on the first floor. McDonnell's notes showed that he and Cudworth started to question Respondent at 8:15 p.m. and that McDonnell did not leave the room until 12:30 on the following morning.

The interrogation was tape-recorded in a room on the first floor, where the interrogation being conducted upstairs could be overheard. Officers were assigned to that room to take notes of the conversations and to keep time checks on various points in the interrogation. Their notes indicated that the interrogation started at approximately 8:15 p.m. and that the recording machine was shut off at 12:15 on the following morning.

The entire recording was played and a transcription of it was read by the trial court when it heard evidence and arguments on Respondent's motion to suppress "potential testimony or other evidence that was obtained in violation of the constitution or laws of the United States or the State of Connecticut."[7] The Supreme Court of Connecticut reviewed the transcription in its disposition of Respondent's case.[8] The entire transcription is appended to this Brief as Exhibit 1, so that this Court may review the facts accurately rather than rely upon the selectively culled portions related by Petitioner.

At the outset of the interrogation, Respondent was told that the police wanted to talk to him about the homicide that had

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[7] Petition at 17A.

[8] Id. at 18A.

occurred in Canton earlier in the week. (T. 446). When the Miranda rights were read and Respondent signed a waiver of those rights, he was informed by Captain McDonnell that he was not under arrest. (T. 447).

During the initial stages of the interrogation, Respondent was asked questions pertaining to the following topics:

(1) His visits to the building in which the victim resided and any acquaintance he might have had with her. (T. 449-60, 473-76).

(2) His departure from the state on the day after the homicide, his reasons for that departure, and his destination. (T. 461, 468-71, 477-81).

(3) His recent employment as a carpenter, which he had given as the cause of the cuts and blisters on his hands. (T. 462-63).

(4) His knowledge of the homicide and the sources of his knowledge. (T. 486-87).

In addition to this questioning, Respondent was told that the police wanted fingerprints and hair samples from all persons who had been in the building. His fingerprints were on file, and he was willing to give samples of his hair. He let his interrogators examine his body and shoes. He agreed to sign a medical release for the police to obtain his blood type and stated his belief that it was AB negative.

Captain McDonnell asked Respondent to consent to a search of his car. At the time, McDonnell apparently believed the car was at the barracks.[9] Respondent was hesitant but agreed to the search after McDonnell said he could watch them and Cudworth assured him that they were not looking for narcotics.

As the interrogation continued, McDonnell sent Cudworth downstairs for consent-to-search and release forms. In Cudworth's absence, Respondent said, "I'd like to talk to my wife if I could." McDonnell's answer was, "Yeah, okay, wait till he comes

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[9] T. 472.

back with the forms." Respondent continued "I'd like to clear a few things up, find out maybe if she knows...which motels and stuff we stayed at." McDonnell answered that the information was unimportant and then said "[b]efore we go if you want to talk to her, try to clean it up."[10]

On Cudworth's return, Respondent again expressed reservations about a search of his car. McDonnell noted he had written "except narcotics or marijuana" on the form.[11]

After the forms were signed, the following conversation occurred:

> [Respondent]: I'd really like to get going as soon as possible, I'm beat.
>
> [Cudworth]: Okay, doing a lot of driving heavy?
>
> [Respondent]: Oh yeah, driving and --
>
> [Cudworth]: Did you do all the driving or did the wife do some?
>
> [Respondent]: Well she did some but I did most of it, I'm, I'm really beat, I'm so damn tired I, I could fall asleep on my feet, get to a motel and just go to sleep.
>
> [McDonnell]: Why don't you go home, sleep in your own house?
>
> [Respondent]: I'm tired of driving.
>
> [McDonnell]: You're home in twenty minutes... twenty-five minutes.
>
> [Respondent]: Oh yeah, but the cars [sic] in Miller's [sic] [New Milford]
>
> [McDonnell]: Oh I thought they brought the car up here.
>
> [Respondent]: No, he, he wanted me to just leave it there I guess.[12]

On learning that the car was in New Milford, McDonnell said "[W]ell, we'll have to go back there somehow and take a look at

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[10] T. 483-84.

[11] T. 488-489.

[12] T. 489.

it, I don't want to do it without you being...around, it doesn't say that here [on the form], but that's how I want do do it...."[13]

The interrogation continued with McDonnell stating that Respondent's leaving on Tuesday, the day after the homicide looked suspicious. More questions were asked about the departure. Respondent was asked to detail his activities on the preceding Monday. He remembered what he had done in the daytime but could recall with certainty only that at night he arrived home very drunk.[14] At this point, Respondent again expressed his desire to terminate the interrogation:

> [S]ee I'm pretty tired, you think I can go, I, I, I'm really, I'd like to terminate this thing cuz ahh any questions I answer, I prob--liable to, start fuckin everything up and telling you I was doing one thing, when I was doing another cuz I'm tired and I don't feel good.[15]

McDonnell's response to Respondent's second request to leave was that being drunk was no crime. He asked if Respondent would mind if they took pictures of his hand.[16] Respondent answered "I don't care."[17] McDonnell said (presumably to Cudworth) "...ask the guys downstairs, some color, color slides, anything...so they can take some photos for us."[18]

Immediately thereafter, Respondent asked once more "[C]an I at least get on the road pretty soon?"[19] McDonnell answered "Hey, we're driving so you won't have to worry about driving, okay?

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[13] T. 489-90.

[14] T. 490-94, 497-99.

[15] T. 499.

[16] Id.

[17] Id.

[18] Id.

[19] Id.

We'll drive you wherever you end up wanting to go."[20]

Respondent, however, persisted in his desire to leave, saying "I want to go back to my car and then from there I'm gonna go, I'll go home, I'll go home, crimidy sakes, cuz I'm so tired. So what do you think?"[21] McDonnell's response was "I think you killed this girl Ricky."[22]

The notes of the officers monitoring the recording contained an entry that Respondent's request to go home followed immediately by Captain McDonnell's accusation occurred at 9:35 p.m.[23]

In the continued interrogation, Respondent expressed his incapability of committing such a heinous act. Captain McDonnell made several comments. He expected to find blood on the seats or steering wheel of Respondent's car. The departure on the next morning looked "pretty suspicious" to a cop. The cut on Respondent's hand appeared to be recent. Blood of the AB type was rare and had been found throughout the victim's apartment.[24]

When Respondent asked for time to think, Sergeant Cudworth asked if he wished to speak to his wife. Respondent answered "[C]an I talk to my wife?" Captain McDonnell responded:

> Yeah, we'll bring up your wife and you can talk to your wife. Now we know you, I'm sure you've confided some of this in your, in your wife, you probably didn't tell her you killed the girl but I'm sure you told her you had to get out of town and you went for this trip.[25]

Respondent's wife was brought upstairs at 9:50 p.m. and conversed privately with him for eight minutes.[26]

When the interrogation resumed, Respondent did not recall the events of April 11-12, 1977. He stated, "I was tripping my fuckin

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[20] Id.

[21] Id.

[22] T. 499-500.

[23] T. 624-25.

[24] T. 502-04.

[25] T. 505

[26] T. 509

brains out."[27]

With Respondent's permission, Captain McDonnell questioned his wife. Beverly Ostroski stated that Respondent left in the morning of April 11 and did not return home until 2:00 a.m. on April 12. He had been drinking and his eyes were dialated like he was "tripping." He was wearing the same clothing and shoes he had on when he left and she did not notice any blood on them or in the car. He did not tell her about anything. He was just "spaced" like he usually was when he got really "bombed." It was his idea to leave on Tuesday morning and they had no particular destination. She returned alone on Wednesday and rejoined him in Vermont on Thursday.[28]

After hearing Beverly Ostroski, Captain McDonnell asked Respondent "[W]hy did you really go out of state Ricky? Think now and tell me the truth."[29] Respondent answered "I was scared... Blood on my hands."[30]

It was only after this, through what he and psychiatrists[31] who testified later in the trial termed "flashbacks," Respondent gave his confession. In a drugged and drunken state he had killed the victim while under the impression that he was combatting imaginary assailants. Thereafter he discarded his clothing and cleaned his car.[32]

Following his confession, Respondent was placed under arrest for murder by Sergeant Cudworth at 11:24 on April 16, 1977.[33]

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[27] Id.

[28] T. 411-514.

[29] T. 514.

[30] T. 515.

[31] Prior to trial, Respondent had filed the notice required by Conn. Practice Book §759 of his intention to introduce expert testimony relating to a condition bearing upon the issue of whether he had the mental state required for the offense charged.

[32] T. 515-20, 529-52, 557-60.

[33] T. 561. Subsequently, Respondent was arrested on a bench warrant issued May 3, 1977, on Sergeant Cudworth's affidavit. Respondent was indicted by a grand jury on June 3, 1977. Printed Record of the Supreme Court of Connecticut 2-7, 8.

The trial court heard arguments on Respondent's motion to suppress in conjunction with Petitioner's offer of Respondent's confession. Respondent argued that the interrogation was custodial within the meaning of Miranda v. Arizona, 384 U.S. 436 (1966), and that his confession should be suppressed because Captain McDonnell and Sergeant Cudworth had refused to honor his requests to cease their questioning, as required by Michigan v. Mosely, 423 U.S. 96 (1975). He also claimed that his confession was involuntary because his will not to incriminate himself had been overcome.[34]

Petitioner contended that Respondent was not in custody when he was interrogated and, therefore, the requirements of the Miranda were inapposite. The voluntariness of the confession was claimed to have been established by a fair preponderance of the evidence. See Lego v. Twomey, 404 U.S. 477 (1972); State v. Staples, 175 Conn. 398, 399 A.2d 1269 (1978).[35]

The trial court denied the motion to suppress and admitted the confession. In doing so, it issued a verbal finding. This finding was not however, the "Finding" submitted to this Court in Petitioner's Appendix A. That Appendix is, in fact, nothing more than an evidentiary ruling made during the testimony of Sergeant Cibula preceding the hearing on the motion to suppress.[36] The trial court's actual finding is reported in the first opinion of the Supreme Court of Connecticut, at page 6A n. 2 of Petitioner's Appendix. This finding differs substantially from the version submitted and labeled by petitioner as "Finding." The real verbal finding is reproduced below for the benefit of

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[34]T. 652-63, 680-87.

[35]T. 663-80.

[36]The ruling that Petitioner has designated as the trial court's finding is at T. 382. The hearing on the motion to suppress starts at T. 436. The actual finding is at T. 687-88.

the Court.

> On April 16, 1978, [sic] the Defendant voluntarily came to the Litchfield Barracks with his wife and child, that the Defendant was under apparent custodial interrogation at the time he was given his Miranda right warnings. There is a distinction in the Miranda warnings from the right to obtain counsel and the right to remain silent. And we are dealing with the right to remain silent in this matter here, and to terminate the custodial interrogation. There is some question with respect to the statements made in [the] transcript as to whether or not equivocally or unequivocally the Defendant asked that the interrogation cease. If we find that there is no equivocation, then that would settle the matter there. If we find there is some question on this matter, then we proceed to whether or not there was a waiver of the rights. And as far as the Panel is concerned on it, we do find there was no violation of the Miranda rights involved herein. And in accordance with State v. Staples, [175 Conn. 398, 399 A.2d 1269 (1978)] we make a finding that the confession is voluntarily, knowingly, and intelligently made, and may be admitted into evidence.[37]

Later in the trial, Petitioner was allowed to place in evidence items to which Respondent objected as being the fruits of an illegal confession. The first item was a print of Respondent's palm that was taken after his arrest by Sergeant Cudworth for the purpose of comparing it with the palm print found on the kitchen counter in the victim's apartment.[38] When asked by the court if there was an independent basis for the admissibility of the palm print (and subsequent items), Petitioner's attorney said:

> I don't think there can be any question, because one of the arguments posed was the fact that when I argued against your finding as to custody was this: that there was no probable cause at that time, and I think it is true that probable cause for the arrest was based on the confession, and if the confession fell, everything fell.[39]
> ....

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[37]T. 687-88.

[38]T. 707-710.

[39]T. 711-12.

> I am certainly willing to admit, as I have stated before, that if the confession falls, all that resulted from the confession, whether you call it the poisonous tree doctrine or what, falls.[40]

III. THE FIRST APPEAL

While Respondent's first appeal was pending, this Court decided Dunaway v. New York, 442 U.S. 200 (1979). Relying upon Dunaway, Respondent claimed that the admission of his confession had violated his Fourth Amendment rights.[41]

At oral argument, Petitioner conceded that when Respondent was brought to the Litchfield Barracks there was no probable cause to arrest or detain him.[42] In its opinion, the Supreme Court of Connecticut stated "[b]ecause the state has conceded that there was no probable cause to arrest or detain, we need not consider what would constitute probable cause in this case."[43]

Petitioner, however, did contend that Respondent was not in custody during his interrogation. On this claim, the Supreme Court of Connecticut opined that the language of the trial court's finding was ambiguous and possibly "an hypothesis assumed in order to reach the fifth amendment issue of the protection of [Respondent's] right to remain silent."[44] The case was remanded for a further articulation on the issue of custody with a direction to consider "the fourth amendment right to be 'secure in their persons...against unreasonable searches and seizures.'"[45]

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[40] T. 715.

[41] The Fourth Amendment claim was allowed by the Supreme Court of Connecticut pursuant to its "exceptional circumstances" doctrine. Petition at 8A.

[42] Petition at 8A.

[43] Id. at n. 3.

[44] Id. at 7A.

[45] Id. at 9A.

IV. THE REMAND

On remand, the trial court found that:

> [I]n the present case, there is no indication that the questioning took place in a context where [Respondent's] freedom to depart was restricted in any way. [Respondent] came voluntarily to the police station barracks, where he was immediately informed that he was not under arrest. He was given and repeated his Miranda rights. In the presence of his wife, he made his confession. At most it could be deemed a coercive environment not converted to a custodial situation.[46]

From these findings, the trial court concluded that Respondent was not taken into custody until after his post-confession arrest by Sergeant Cudworth.

V. THE SECOND APPEAL

The Supreme Court of Connecticut held that the determination of the trial court that Respondent was not in custody prior to his formal arrest was clearly erroneous. On the facts of the instant case, the Supreme Court of Connecticut concluded that Respondent was "seized" when he was taken to the Litchfield Barracks and that the trial court erred in admitting the confession and the physical evidence obtained as a result of the interrogation.[47] The court specifically noted that Petitioner had not argued that, in this case, there was any intervening act sufficient to purge the evidence of the taint of the illegal detention.[48]

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[46]Petition at 13A.

[47]Id. at 15A, 19A, 22A.

[48]Id. at 19A, n. 2

REASONS FOR DENYING THE PETITION

1. THE SUPREME COURT OF CONNECTICUT CORRECTLY CONCLUDED THAT RESPONDENT HAD BEEN SEIZED AND HELD IN CUSTODY IN VIOLATION OF THE FOURTH AMENDMENT

Because of Petitioner's concessions, the Supreme Court of Connecticut was presented with only the narrow question of whether Respondent had been seized and held in custody. As discussed in the Statement Of The Case, supra at 12-13, Petitioner conceded that it had no probable cause[49] to arrest or detain Respondent until after he had actually confessed. Petitioner further failed to argue that there was any intervening act sufficient to purge the confession or other evidence of the taint of the detention. See p. 13, supra.

There is no dispute concerning the substantive law that applies to this case. Aside from certain well-recognized exceptions of brief duration,[50] the Fourth Amendment's requirement that seizures must be supported by probable cause applies equally to formal arrests and investigatory detentions. Dunaway v. New York, 442 U.S. 200, 214-15 (1979); See Davis v. Mississippi, 394 U.S. 721, 726-27 (1969). A "seizure" occurs whenever a police officer accosts an individual and restrains his freedom to walk away. Terry v. Ohio, 392 U.S. 1, 16 (1968). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if,

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49 Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175-76 (1949), quoting Carroll v. United States, 267 U.S. 132, 162 (1925).

50 E.g. United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roving border patrols allowed to stop vehicles and ask limited questions on reasonable suspicion that illegal aliens are being transported); Terry v. Ohio, 392 U.S. 1 (1968) (limited search - i.e. a pat-down for weapons allowed on reasonable suspicion that person being investigated is armed).

in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion announcing the judgment). See Reid v. Georgia, 448 U.S. 438, 442-43 (1980) (Powell, J., concurring).

It is on the application of the substantive law to the facts of this case that the parties disagree. Whether a seizure has occurred has been described as "a fact-bound question with a totality-of-circumstances assessment." United States v. Mendenhall, supra, 446 U.S. at 569. (White, J., dissenting). The same approach has been applied to the related Fourth Amendment problem of determining the voluntariness of consents to searches. Schneckcloth v. Bustamonte, 412 U.S. 218, 227 (1973).

Petitioner contends that a seizure did not occur in the instant case because the delivery of Respondent to the Litchfield Barracks and the ensuing interrogation resulted from Respondent's telephone call to the police. Likening this case to Oregon v. Mathiason, 429 U.S. 492 (1977), Petitioner has argued that Respondent's transportation to the barracks and his presence there during the interrogation were his own consensual acts.

In Mathiason, supra, this Court held that the particular circumstances of an interview at a police office did not rise to the level of custodial interrogation and thus did not require an advisement of Miranda rights prior to questioning. A comparison between the factual situations in Mathiason and the instant case, however, demonstrates that the differences between them far outweigh any similarities.

The respondent in Mathiason had telephoned a police officer in response to a message that the officer wished to discuss something with him. The time and place of the subsequent meeting were left to the respondent's choosing. When the respondent ex-

pressed no preference, the meeting was scheduled for the state patrol office at 5:00 p.m., one and one-half hours after the call. This respondent went to the meeting by himself. In a taped conversation, the respondent was informed that he was not under arrest but that the police believed that he had been involved in a burglary. Id. at 493.

Within five minutes after the interview started, the respondent in Mathiason had admitted taking certain property. Thereafter, the respondent was advised of his Miranda rights, and the officer took his taped confession. At the end of the interview, the officer told the respondent that he was not arresting him but was referring the case to the district attorney who would determine whether charges would be brought. The entire interview in Mathiason lasted thirty minutes, and the respondent departed at 5:30 p.m. Id. at 493-94.

In contrast, when the Respondent in the instant case, made his telephone call, he was told to report to the Litchfield Barracks that night. Most significantly on the question of seizure, the police, in this case, took direct action to insure that Respondent would comply with this command. Petitioner has described the transportation of Respondent from New Milford to Litchfield in Sergeant Cibula's police car as "a matter only of mutual convenience." Petition at 16. The evidence, however, is plainly otherwise.

Sergeant Cibula, the supervisor at the barracks testified that when he was informed of Respondent's call, he was determined that Respondent was going to the New Milford Police Department. See p. 4, supra. The only possible inference from Cibula's testimony is that he wanted Respondent in safekeeping, and he was not going to risk Respondent's leaving before the police arrived. Cibula's unambiguous intention to detain is relevant to this case

because it was conveyed to Respondent by the arrival of Officer McKay, who escorted him to the New Milford Police station to await the arrival of the state police. See United States v. Mendenhall, supra, 446 U.S. at 554, n. 6.

At the trial, Petitioner's attorney described McKay as a "transporting authority" and Respondent as having been in the "custody" of McKay.[51] See p. 4, supra. Obviously, Cibula -- who gave the order and who subsequently drove Respondent to Litchfield himself -- acted in the same capacity. This series of events plainly satisfied the objective test for a "seizure" enunciated in Mendenhall. A reasonable person who had been told to report to a distant police barracks that night would not have believed he was free to leave the policeman who had been sent to take him there. See United States v. Jones, 630 F.2d 613, 616 (8th Cir. 1980). This is, in short, a case involving an order to "pick up" Respondent and "bring him in." See Dunaway v. New York, supra, 442 U.S. at 203.[52]

Petitioner argues that the question of seizure must be confined to Respondent's encounter with Sergeant Cibula. Petition at 17-19. But, even if Respondent's dealings with Cibula were

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[51]Petitioner's attorney described Officer McKay as a "custodian" and a "transporting authority" in spite of the fact that Respondent drove his car to the New Milford Police Station while being escorted by McKay. In these circumstances, it made little difference whether Respondent rode to the Litchfield Barracks in Cibula's car -- which he did -- or drove his own car under escort. The "mutual convenience" referred to in p. 16 of the Petition was obviously of no real importance. Respondent was in custody no matter what the mode of travel.

[52]Petitioner suggests that Cibula's action in driving to New Milford was unauthorized. Petition at 4-5. At the trial, however, Petitioner's attorney, on his direct examination of Cibula, established that Cibula was the night shift supervisor at the Litchfield Barracks on April 16, 1977, and that the desk officer (McDermott) who made the arrangements with the New Milford police was under Cibula's command. T. 377-78.

assumed to be consensual, the further question of the legality of his subsequent detention and interrogation would remain. See Dunaway v. New York, supra, 442 U.S. at 212-13; United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975).

Contrary to Petitioner's assertions, the Supreme Court of Connecticut did not misinterpret the issue before it. That issue was the admissibility of Respondent's confession and other evidence that were alleged to have been obtained in violation of the Fourth Amendment. The Supreme Court of Connecticut concluded that the trial court erred in admitting the incriminating evidence because Respondent had been illegally seized and held in custody. Petition at 19A, 21A-23A. Before reaching its conclusions, the Supreme Court of Connecticut was constitutionally required to consider all of the underlying circumstances. See Taylor v. Alabama, 50 U.S. L.W. 4783 (U.S. June 23, 1982) (No. 81-5162). Dunaway v. New York, supra, Brown v. Illinois, 422 U.S. 590 (1975). Indeed, Petitioner appears to appreciate the fallacy of its claim by attempting to revive the previously conceded issue of lack of probable cause. Petition at 19.

A "seizure" may be occasioned by a show of police authority as well as by use of physical force. United States v. Mendenhall, supra, 446 U.S. at 553. The authority exhibited in this case is demonstrated vividly by comparing the circumstances of Respondent's interrogation with the encounter at issue in Oregon v. Mathiason, supra.

The suspect in Mathiason never requested that his thirty minute session with the police officer be terminated. In contrast, the Respondent in the instant case, made three requests to leave between 8:15 p.m., when the interrogation commenced, and 9:35 p.m. Each request was deflected by questions or statements from Captain McDonnell that would indicate to a reasonable person that the

requests had been rebuffed. See pp. 7-9, supra. The interrogation continued for several hours thereafter. The extent of the detention is a factor to be considered in determining its lawfulness. United States v. Anderson, 663 F.2d 934, 941 (9th Cir. 1981). The suspect in Mathiason was free to depart even after he had confessed. The Respondent in the instant case was never informed that he was free to go. The comments of the police during his interrogation made it clear that they intended to continue his detention. Respondent was even told that he was to present at a search of his car in which the police said they expected to find incriminating evidence. See pp. 7-9, supra.

The conclusions of the Supreme Court of Connecticut, in this case, parallel the decisions of this Court in Taylor v. Alabama, supra, Dunaway v. New York, supra, and Brown v. Illinois, supra. Respondent was taken into custody without probable cause and interrogated in the hope that something would turn up. Petitioner has never claimed that the confession and other evidence obtained was separated from the "seizure" by an intervening event. Under these circumstances, there is no reason for this Court to review this issue.

II. PETITIONER'S CLAIM THAT RESPONDENT WAS SEIZED UPON PROBABLE CAUSE WAS EXPRESSLY ABANDONED IN THE STATE COURTS AND HAS NOT BEEN PRESERVED FOR REVIEW BY THIS COURT

As discussed supra, Petitioner conceded in the Supreme Court of Connecticut that at the time of Respondent's arrival at the police barracks there was no probable cause to arrest or detain him. Petition at 8A. In a desperate attempt to escape the consequences of this concession, Petitioner has now contended in its Petition that, "if an informal seizure occurred at all in this case, it occurred at a point in time at which the police had probable cause to believe the respondent committed the killing."

Id. at 19. The specific contention appears to be that probable cause developed during the course of Respondent's interrogation but before Respondent had actually confessed.

This claim was, however, expressly abandoned by Petitioner in the trial court. During the suppression hearing, Petitioner's attorney explicitly conceded that "probable cause for the arrest was based on the confession, and if the confession fell, everything fell." (T. 712). A few minutes later, this concession was reiterated. "I am certainly willing to admit, as I stated before, that if the confession falls, everything falls, all that resulted from the confession, whether you call it the poisonous tree doctrine or what, falls." (T. 715). As a result of this concession, neither the trial court nor the Supreme Court of Connecticut have had an opportunity to pass on this claim, which Petitioner has now raised in this Court for the first time. Consequently, as the Court has repeatedly explained, there is no federal jurisdiction to consider this question.

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat, 311, 315 (1819), and since....

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). This jurisdictional rule is required by 28 U.S.C. §1257(3) (1976)[53] and is

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[53]This statutory jurisdictional requirement distinguishes the certiorari review of state court judgments from that of lower federal court judgments. Compare, e.g., United States v. Mendenhall 446 U.S. 544, 551-52, n. 5 (1980), with Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). See Sup. Ct. R. 21.1(h).

supported by powerful policy considerations and reasons of practicality alike. Webb v. Webb, 451 U.S. 493, 499-501 (1981). Since the federal question presented has never been raised, preserved, or passed upon in the State courts below, it should not and cannot now be considered here.

III. THE ERRONEOUS ADMISSION OF RESPONDENT'S CONFESSION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Faced with the admission of his illegally obtained confession over his objection, Respondent took the stand in support of a defense that he lacked the requisite intent to commit murder or, in the alternative, that he "acted under the influence of extreme emotional disturbance." See Conn. Gen. Stat. §53a-54a(a). In the course of his testimony, he admitted a confused memory of stabbing Kim Steacy. (T. 867-68). Petitioner consequently claims that "these facts rendered any error in the admission of the challenged evidence harmless beyond a reasonable doubt." Petition at 20. This mistaken contention is irreconcilable with the governing principles established by this Court.

The controlling case -- conveniently ignored by petitioner -- is Harrison v. United States, 392 U.S. 219 (1968). Harrison, like the instant case, involved a criminal defendant who, faced with the admission of an illegally obtained confession over his objection," took the witness stand and testified to his own version of the events leading to the victim's death." Id. at 220. His conviction was reversed on appeal and, on remand, the prosecution read to the jury the defendant's testimony at the prior trial The resulting conviction was reversed by this Court, holding that "the same principle that prohibits the use of confessions [wrongfully] procured also prohibits the use of any testimony impelled thereby." Id. at 222. The Court's reasoning is squarely applicable to the instant case.

> In concluding that the petitioner's prior testimony could be used against him without regard to the confessions that had been introduced in evidence before he testified, the Court of Appeals relied on the fact that the petitioner had "made a conscious tactical decision to seek acquittal by taking the stand after [his] in-custody statements had been let in...." But that observation is beside the point. The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.

Id. at 223.

The Court, moreover, squarely placed the burden of proving that the wrongfully obtained confession did not induce the defendant's trial testimony squarely on the shoulders of the prosecution.

> [H]aving illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. "The springs of conduct are subtle and varied," Mr. Justice Cardozo once observed. "One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others." Having "released the spring" by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.

Id. at 224-25 (quoting DeCicco v. Schweizer, 221 N.Y. 431, 438, 117 N.E. 807, 810 (1917).

Petitioner does not even venture to suggest such a showing in the instant case, and indeed none can be made. Respondent, like Eddie Harrison, took the stand only after his confession had been admitted in evidence. Had that confession not been introduced, he might well have not testified at all. And, even if he would have testified anyway, he would not necessarily have admitted being at the scene of the crime and stabbing the victim.

"On the contrary, the more natural inference is that no testimonial admission so damaging would have been made if the prosecutor had not already spread [his confession] before the jury." Id. at 225-26. This is an inference that Petitioner has not dispelled. Under these circumstances, it can hardly be said that the admission of Respondent's unlawfully obtained confession was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).[54]

IV. A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT BE ADOPTED AND APPLIED TO THIS CASE

Petitioner's final contention is that this Court should adopt a "good faith" exception to the exclusionary rule and apply such an exception in this case. This invitation should be rejected for three independent reasons.

(a) Petitioner acknowledges that this claim, like its second contention discussed supra, was never raised, preserved, or passed upon in the state courts below. Petition at 26, n. 17. As this Court explained in Cardinale v. Louisiana and Webb v. Webb, supra, Petitioner's failure to initially present its claim to the state courts necessarily results in a lack of federal jurisdiction to review that claim. Petitioner's rationalization that it was not obligated to raise its claim below because the state courts were "incompetent to rule definitively upon it" is unsupported by an authority and cannot be reconciled with the explicit requirements of 28 U.S.C. §1257 and the powerful policy considerations enunciated in Cardinale and Webb. Petitioner's argument, if adopted,

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[54]This case is obviously distinguishable from Milton v. Wainwright, 407 U.S. 731 (1972); Schneble v. Florida, 405 U.S. 427 (1972); and Harrington v. California, 395 U.S. 250 (1969), which held the evidentiary errors at issue in those cases to be harmless beyond a reasonable doubt by virtue of concededly admissible inculpatory statements made by the defendants. The statements by the defendants in those cases that vitiated the errors at issue were pretrial statements. Milton, Schneble, and Harrington did not purport to consider the cause-and-effect relationship between a confession spread before the jury and the subsequent testimony of the accused at issue in Harrison and the instant case.

would relieve any litigant of raising any federal claim in any lower court, since this Court is necessarily the ultimate source of "definitive" rulings.

(b) Petitioner's substantive argument that a "good faith" exception to the exclusionary rule should be adopted by this Court has now been succinctly answered by this Court in Taylor v. Alabama, 50 U.S.L.W. 4783 (U.S. June 23, 1982) (No. 81-5152), in response to a similar contention by Alabama. "To date, we have not recognized such an exception, and we decline to do so here." Id. at 4785.

(c) The theoretical merits of a "good faith" exception to the exclusionary rule aside, the instant case is a plainly inappropriate one for the enunciation and application of such an exception. The subjective good faith of the police officers who interrogated Respondent was not a subject of inquiry in the trial court, and the existence of such a benevolent mentality is by no means as "apparent from the record" as Petitioner asserts. The central fact of this case is that Respondent repeatedly asked to leave and that his interrogation cease and that the police repeatedly deflected or ignored his requests. This is not a case of well-mentioned law enforcement officers unintentionally running afoul of an abstruse rule of law. This is a case of law enforcement officers, bent on obtaining a confession from a person they had seized without probable cause, who aggressively and ceaselessly employed every possible stratagem to cajole, entice, and extract that confession after their prisoner had made it crystal clear that he wanted the interrogation to cease. No "good faith" exception should countenance such official behavior.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOETTE KATZ
JERROLD H. BARNETT
JON C. BLUE
Chief Public Defender's Office
121 Elm Street
New Haven, Connecticut 06510
(203) 789-7477
Counsel for Respondent

July 15, 1982

NO. 81-2285

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF CONNECTICUT,
Petitioner,

v.

RICHARD OSTROSKI,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition, together with a copy of its Appendix, was deposited in a United States post office, with first-class postage prepaid, addressed to Austin J. McGuigan, Esq., Chief State's Attorney, P.O. Box 5000, Wallingford, Connecticut 06492, this 15th day of July, 1982. I further certify that all parties required to be served have been served.

Jerrold H. Barnett

JERROLD H. BARNETT
Chief Public Defender's Office
121 Elm Street
New Haven, Connecticut 06510
(203) 789-7477
Counsel for Respondent

NO. 81-2285

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Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

STATEMENT CONCERNING MAILING

I, Jerrold H. Barnett, having been first duly sworn, hereby make affidavit and say as follows:

1. I am an attorney for the Respondent in the above-entitled action and a member of the bar of this Court. I am making this Statement pursuant to S.Ct. Rule 28.2.

2. To my knowledge, copies of the Respondent's Brief in Opposition, its Appendix, and a Motion for Leave to Proceed in Forma Pauperis were deposited in a United States post office, with first-class postage prepaid, and properly addressed to the Clerk of this Court, on July 15, 1982, within the permitted time for such filing.

Jerrold H Barnett

JERROLD H. BARNETT

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } ss NEW HAVEN

Personally appeared before me Jerrold H. Barnett, signer of the foregoing Statement, who, being first duly sworn, declared it to be his free act and deed this 15th day of July, 1982.

JON C. BLUE
Commissioner of the Superior Court

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NO. 81-2285

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STATE OF CONNECTICUT,
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Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, the Respondent in the above-entitled case hereby moves, through his attorney, that he be allowed to proceed in forma pauperis. Because Respondent is confined in the Connecticut Correctional Institution, Somers, it has not been possible for his attorney to obtain a current financial affidavit from him. A copy of the affidavit that Respondent executed for his appeal in the lower courts and an affidavit of his attorney are attached hereto. Respondent's motion to proceed in forma pauperis in his lower court appeal was granted on May 4, 1979.

PETITIONER
RICHARD OSTROSKI

BY: Jerrold H. Barnett

JERROLD H. BARNETT
Chief Public Defender's Office
121 Elm Street
New Haven, Connecticut 06510
(203) 789-7477
His Attorney

STATE OF CONNECTICUT
APPLICATION FOR WAIVER OF FEES, COSTS AND EXPENSES AND APPOINTMENT OF COUNSEL ON APPEAL FROM JUDGMENT OF CONVICTION

DOCKET NO. 41843

STATE OF CONNECTICUT
vs.
Richard Ostroski
(Name of defendant)

SUPERIOR COURT
COUNTY OF Hartford J.D. Judicial Dis

October 19, 1978
(Date of Judgment)

1. I am indigent and cannot pay the costs and expenses of an appeal, nor can I afford to obtain an attorney.

2. The grounds upon which I propose to appeal are:

1. It is against the law.

2. It is against the evidence.

3. The court committed error in admitting a confession, and various other evidence and testimony against the defendant.

3011 3011
3014 3014

WHEREFORE, I request that the court (1) waive the payment by me of the fees specified in Sec. 602 of the Connecticut Practice Book, taxable costs, and the requirement of Sec. 612 concerning the furnishing of security for costs upon appeal, (2) appoint counsel to prosecute my appeal without expense to me and (3) order that the necessary expenses of prosecuting the appeal be paid by the state, pursuant to Section 603 of the Connecticut Practice Book.

3015
3016
3017

Richard Ostroski
(Signature of defendant)

Subscribed and sworn to before me this 21st day of November, 19 78

Title: Commissioner of Superior Court

UNLESS THE COURT EXTENDS THE TIME LIMIT, THIS APPLICATION MUST BE SIGNED AND FILED WITHIN TWENTY (20) DAYS FROM THE DATE OF JUDGMENT WITH:

CLERK, SUPERIOR COURT, COUNTY OF .....

JD-CR 44-B 8-78

AFFIDAVIT

I, Jerrold H. Barnett, having been first duly sworn, hereby make affidavit and say as follows:

1. I am the Chief of Legal Services for the Chief Public Defender's Office in Connecticut and have represented Richard Ostroski in the appeal of his conviction.

2. Mr. Ostroski is currently confined in the Connecticut Correctional Institution, Somers, serving a life sentence.

3. To the best of my knowledge and belief, Mr. Ostroski has no income or assets whatsoever and because of his poverty is unable to pay the costs of proceeding in the Supreme Court of the United States or to give security therefore.

Jerrold H. Barnett
JERROLD H. BARNETT

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } ss NEW HAVEN

Personally appeared before me, Jerrold H. Barnett, signer of the foregoing Affidavit, who, being first duly sworn, declared it to be his free act and deed this 15th day of July, 1982.

Jon C. Blue
JON C. BLUE
Commissioner of the Superior Court